No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, JEWISH SOCIAL POLICY ACTION NETWORK, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, NATIONAL CENTER FOR LESBIAN RIGHTS, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION &
SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. Title VII's Protection Against
Religious Discrimination Is Vitally Important.... 4

*A. Religion-Based Employment
Discrimination Remains A Serious Problem* 4

*B. Title VII's Religious Accommodation
Provision Plays a Central Role In Securing
Equal Opportunity* 7

II. The Tenth Circuit's Rule Undermines Both
Title VII's Central Purpose and Its Central
"Bilateral Cooperation" Mechanism 10

*A. The Tenth Circuit's Approach Would
Reward Willful Blindness and
Short-Circuit Bilateral Cooperation* 10

*B. The Tenth Circuit's Rule Is Unsupported By
and Is, in Central Respects,
Contrary To The Statute* 14

C. Policy Considerations, Including Those Invoked Below, Support An Entirely Different Rule 21

III. The Court Should Take Care Not To Endorse Customer Preference as a Proper Component of An Undue Hardship Analysis 26

CONCLUSION 33

TABLE OF AUTHORITIES

Cases: Page(s)

Adeyeye v. *Heartland Sweeteners, LLC*,
721 F.3d 444 (7th Cir. 2013) 16

Ansonia Bd. of Educ. v. *Philbrook*,
479 U.S. 60 (1986).....*passim*

Beck v. *Univ. of Wis. Bd. of Regents*,
75 F.3d 1130 (7th Cir. 1996) 12

Bhatia v. *Chevron U.S.A., Inc.*,
734 F.2d 1382 (9th Cir. 1984) 26

Bd. of Trustees of the Univ. of Ala. v. *Garrett*,
531 U.S. 356 (2001).....5, 6

Burrage v. *FedEx Freight, Inc.*,
No. 4:10CV2755, 2012 WL 1068794
(N.D. Ohio March 29, 2012) 18

Chaney v. *Plainfield Healthcare Ctr.*,
612 F.3d 908, 913 (7th Cir. 2010).....30

Cloutier v. *Costco Wholesale Corp.*,
390 F.3d 126 (1st Cir. 2004) 29

Davoll v. *Webb*, 194 F.3d 1116 (10th Cir. 1999) 12

Dean v. *United States*, 556 U.S. 568 (2009) 21

Desert Palace, Inc. v. *Costa*, 539 U.S. 90 (2003) 15

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442 F.2d 385 (5th Cir. 1971) 31, 32

EEOC v. *Alamo Rent-A-Car LLC*,
432 F. Supp. 2d 1006 (D. Ariz. 2006).....29

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No. CO4-1291 JLR, 2005 WL 2090677
(W.D. Wash. Aug. 29, 2005) 29

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530 F. Supp. 86, 91 (N.D. Ga. 1981) 30

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496 F.3d 393 (5th Cir. 2007) 18

Emp't Div. v. *Smith*, 494 U.S. 872 (1990) 19

Fernandez v. *Wynn Oil Co.*,
653 F.2d 1273 (9th Cir. 1981) 30

Global-Tech Appliances v. *SEB S.A.*,
131 S. Ct. 2060 (2011).....19

Gonzales v. *O Centro Espirita Beneficente UDV*,
546 U.S. 418 (2006).....27

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Graham Cnty. Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 559 U.S. 280 (2010).....15

Grayson v. *Schuler*, 666 F.3d 450 (7th Cir. 2012)....20

Hernandez v. *Comm'r of Internal Revenue*, 490 U.S. 680 (1989).....21

Hitchcock v. *Angel Corps, Inc.*, 718 F.3d 733 (7th Cir. 2013) 15, 16

Kalsi v. *New York City Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998), aff'd, 189 F.3d 461 (2d Cir. 1999).....26

Keith v. *County of Oakland*, 703 F.3d 918 (6th Cir. 2013) 9

Megivern v. *Glacier Hills, Inc.*, 519 Fed. Appx. 385 (6th Cir. 2013) 15

Shaare Tefila Congregation v. *Cobb*, 481 U.S. 615 (1987).....32

Torcaso v. *Watkins*, 367 U.S. 488 (1961).....21

Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977).....*passim*

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120 F.3d 749 (8th Cir. 1997) 21

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Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 255 (1964)..7

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31 U.S.C. § 3130(e)(4) 15

42 U.S.C. § 2000e(j).....*passim*

42 U.S.C. § 2000e(k).....15

42 U.S.C. § 2000e(m).....9, 27

42 U.S.C. § 2000e-2(a)(1) 7, 17

42 U.S.C. § 2000e-2(a)(2) 32

42 U.S.C. § 2000e-2(m) 17, 19

42 U.S.C. § 2000bb-2(3) 27

42 U.S.C. § 12112(d)(2) 24

42 U.S.C. § 12112(d)(3) 24

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18 Cong. Rec. 706 (1972).....13

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29 C.F.R. § 1605.3(b)(2) 23

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Religious Discrimination 12-IV(A)(2). 12

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Charge Statistics FY 1997-2013 4

EEOC, Pre-Employment Inquiries and
Religious Affiliation or Beliefs 23

F.B.I., *Uniform Crime Report, Hate Crimes Statistics, 2012*.....5

Other Materials:

Daron Acemoglu & Joshua D. Angrist,
Consequences of Employment Protection? The Case of the Americans with Disabilities Act, 109 J. Pol. Econ. 915 (2001) 6

Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*,
25 Berkeley J. Emp. & Lab. L. 527 (2004).....6, 7

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The Changing Nature of Employment Discrimination Litigation,
43 Stan. L. Rev. 983 (1991) 7

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Linda Hamilton-Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995) 6

Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. Soc. Issues 221 (2012).....7

Romtin Parvaresh, Note, *Prayer for Relief: Anti-Muslim Discrimination As Racial Discrimination*, 87 S. Cal. L. Rev. 1287 (2014) 32

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INTEREST OF *AMICI CURIAE*[*]

As described more fully in the annexed appendix, *amici* are organizations with long involvement in addressing religious discrimination in the workplace and urging the adoption and enforcement of laws to make workplaces more open to and inclusive of Americans of all backgrounds. All of us are committed to protecting religious liberty, combatting intolerance and bigotry, and promoting understanding and dialogue in our increasingly religiously diverse Nation.

INTRODUCTION & SUMMARY OF ARGUMENT

A. Religion-based employment discrimination remains a significant problem. The problem is particularly acute for members of minority faith traditions, whose beliefs and practices are often (unlike in this case) poorly understood by employers. These challenges are only exacerbated at the hiring stage, where decisions are more likely to be influenced by stereotypes and generalizations and where compliance with antidiscrimination law is especially difficult to monitor and enforce.

Since its enactment, Title VII has ranked discrimination based on religion alongside that based on race, sex, and national origin. In 1972, Congress amended the statute to clarify that religious

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[*] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

discrimination goes beyond decisions that disfavor an employee or prospective employee based on her religious affiliation. Rather, Congress recognized that, for many Americans, "religion" is about *practices* as much as beliefs; that these practices, which can mark adherents as visibly different from others, themselves occasion prejudice; and that workplace practices developed with only the religious observances of workers from mainstream faith backgrounds in view can subject employees from other traditions to intolerable work-faith conflicts. Accordingly, Congress declared that an employer's inflexible refusal to reasonably accommodate an employee's religious observance or practice is itself a form of prohibited discrimination.

As Congress recognized, some such conflicts may be genuinely insolvable. But the vast majority can be resolved through employee-employer discussion and relatively simple accommodations. For that reason, Title VII's religion provisions should be interpreted to encourage "bilateral cooperation" between employers and current or prospective employees. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted).

B. The Tenth Circuit's decision disregards these core principles by imposing unique and onerous requirements on applicants and employees who seek to establish religion-based discrimination. These requirements lack support in Title VII's text, structure, and history, as well as common sense. Both the Tenth Circuit's rule and the reasoning offered in support of it reflect a narrow and grudging understanding of religion, religious practice, and religious accommodation that stands in stark contrast

to what Congress codified in Title VII. Especially troubling are the *practical* effects of allowing the Tenth Circuit's rule to stand. The decision below did not simply short-circuit a case where there is ample evidence to sustain a finding of a Title VII violation: it provided a detailed roadmap for employers, particularly those making hiring decisions, to circumvent the statute's equal opportunity mandate.

The Tenth Circuit was right in at least one respect: The proper approach must not give employers license to ask applicants all manner of questions about their religious beliefs or observances. At the same time, those concerns may properly be addressed through a different rule, one more consistent with both the statute and the realities of the workplace. Simply put, when an employer has enough information to reasonably perceive a potential conflict between its work requirement and an applicant's religious observance, the employer should initiate a process of bilateral cooperation to determine the presence and scope of any conflict and the need for an accommodation.

C. *Amici* also are concerned about an issue that forms part of the backdrop for this case and that may arise on remand: the claim that permitting Ms. Elauf to wear a hijab at work would cause respondent's business "undue hardship," on the theory that doing so would deviate from the "look" respondent and its customers prefer salespeople to maintain.

Such broad and casual assertions of a need for complete homogeneity are, we submit, often unfounded. More fundamentally, however, *amici* urge that this Court take care not to endorse the premise, which some lower court decisions have too

readily accepted, that actions catering to customer (or co-employee) prejudice are within the statute's "undue hardship" defense. In a wide range of contexts, including race and sex discrimination, Congress, this Court, and influential lower court decisions have recognized that indulging such preferences, even for "business" reasons, is itself a form of intentional discrimination. That is no less true in cases involving religious bias, and *amici* urge that the Court refrain from giving the notion even indirect encouragement here.

ARGUMENT

I. Title VII's Protection Against Religious Discrimination Is Vitally Important

A. Religion-Based Employment Discrimination Remains a Serious Problem

1. Although it has been 50 years since Congress prohibited employment discrimination based on religion, such discrimination remains a serious and persistent problem. The annual number of religious discrimination charges filed with the EEOC has more than doubled since 1997, see EEOC Enforcement & Litigation Statistics, Charge Statistics FY 1997-2013, even as (or, perhaps, in part because) America has become much more religiously diverse.[1]

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[1] See Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey 5-6 (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (finding that "the United States is on the verge of becoming a minority Protestant country," and that "[i]mmigrants are also disproportionately represented among several world religions in the U.S., including Islam, Hinduism and Buddhism").

As with other forms of bias, some workplace discrimination against religion reflects "insensitivity caused by simple want of careful, rational reflection or * * * some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). But open bias against adherents of particular faiths remains part of the current landscape. As particularly relevant to this case, large numbers of Americans—some 43% of respondents in a 2010 Gallup survey—are willing to "*admit* to feeling at least 'a little' prejudiced toward Muslims."[2] See also FBI, *Hate Crimes Statistics 2012*, http://tinyurl.com/lo8f3m9 (reporting that nearly 1 in 5 hate crimes was religiously motivated, and 59.7% of these targeted Jewish victims).

The individual costs and burdens imposed by anti-religious prejudice are substantial, especially in economic conditions where employment opportunities can be scarce. At the same time, the *benefits* of antidiscrimination laws go well beyond those immediately protected. Both employers and "the larger society" benefit when the talents and productive capacity of religious individuals are put to full use. *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). Like other civil rights laws, Title VII gives employers (and co-workers, and customers) "an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for

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[2] *In U.S., Religious Prejudice Stronger Against Muslims*, Gallup Center for Muslim Studies (Jan. 21, 2010), http://www.gallup.com/poll/125312/religious-prejudice-stronger-against-muslims.aspx (emphasis added).

accepting" people whose religious traditions may differ from their own. *Ibid.*

2. As many courts and scholars have observed, discrimination at the hiring stage is an especially pervasive and intractable problem. For one thing, employers generally have far more limited information about applicants than about current employees. As a result, it is more likely that employers will resort to the sort of group-based stereotyping and assumptions that can be particularly disadvantageous to members of groups whose beliefs and practices tend to be unfamiliar in the workplace. See Linda Hamilton-Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188-1204 (1995).[3]

At the same time, the nature of the hiring process makes it much harder to enforce compliance with antidiscrimination obligations. A *former employee* who suspects that her discharge was discriminatory often will have both a strong incentive to pursue

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[3] As scholars have concluded with respect to the Americans with Disabilities Act, the fact that an applicant may be entitled to seek a reasonable accommodation under the statute may itself tilt the hiring decision against her, especially when the employer overestimates the costs that an adjustment would entail. See Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 Berkeley J. Emp. & Lab. L. 527, 536-537 (2004); Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. Pol. Econ. 915, 916-917 (2001); see also *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977) (equating reasonable religious accommodation with measures that entail "de minimis" cost).

redress and sufficient knowledge about the employer's practices to substantiate her claim. In contrast, unsuccessful *applicants* rarely have access to the kind of information needed to determine, let alone prove, that discrimination played a role in an employer's decision.[4] Even when they suspect discrimination, moreover, people in need of employment (especially, as here, entry-level employment) may sensibly choose to devote their energies to the ongoing job search rather than investigating and litigating one particular firm's refusal to hire. And for all of these reasons, people who have been subject to unlawful discrimination at the hiring stage are far less likely than those claiming discriminatory discharge to be able to obtain counsel to vindicate their rights. See also Bagenstos, 25 Berkeley J. Emp. & Lab. L. at 557 (explaining that employers' perceptions that litigation and liability risks of discriminating at the hiring stage are low may raise the prevalence of such behavior).

B. Title VII's Religious Accommodation Provision Plays a Central Role in Securing Equal Opportunity

Since 1964, Title VII has barred employers from "discriminat[ing] against" an employee or prospective employee "because of" that individual's "religion." 42 U.S.C. § 2000e-2(a)(1); Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 255. The original statute did not define "religion," however, which triggered questions about whether it reached

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[4] See, *e.g.*, Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. Soc. Issues 221, 222 (2012); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1028 (1991).

employer practices that burdened various aspects of religious observance and whether and to what extent employers' refusal to accommodate an employee's religious needs was actionable. See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 72-73 (1977) (describing history).

In 1972, Congress amended Title VII to provide a definition of "religion." Pub. L. No. 92-261, § 2(7), 86 Stat. 103. Although many mainstream Protestant denominations often place *belief* at the center of religious identity, Congress recognized that other faith traditions—including some of those least understood and most likely to be discriminated against—view various *practices* as integral to what it means to be religious. What is more, Congress recognized, workplaces and work schedules have long been structured in ways that harmonize with the religious observances of adherents of long-recognized, mainstream faiths. (It is hardly a coincidence that few offices are open on Sundays or that, at least in many parts of the United States, almost no employers require employees to work on Christmas or Easter.) For these reasons, adherents of "minority" faiths are *particularly* likely to encounter conflicts between their religious observances and employers' generally applicable workplace rules.

Congress addressed these realities in two ways. First, it clarified that discrimination based on a person's religious observances and practices is itself prohibited religious discrimination. See 42 U.S.C. § 2000e(j) (stating that "[t]he term 'religion' includes all aspects of religious observance and practice"). Second, Congress declared that employers have an obligation "to reasonably accommodate" all "religious

observance[s] or practice[s]." *Ibid.* That accommodation requirement, however, is not without limit. Rather, Congress provided that no accommodation is required if an employer can "demonstrate[]" that providing one would cause "undue hardship on the conduct of the employer's business." *Ibid.*; see 42 U.S.C. § 2000e(m) (1991 amendment providing that, as used in Title VII, the term "demonstrates" means "meet[ing] the burdens of production and persuasion").

As this Court has explained, a central aim of this provision is to identify and ultimately achieve "an acceptable *reconciliation* of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted; emphasis added). Reasonable accommodation is thus a *process* that involves an interaction between the employer and the current or prospective employee. Cf. *Keith* v. *County of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013) ("The duty to engage in [an] interactive process with a disabled employee is mandatory and requires communication and good-faith exploration of possible accommodations.") (internal quotation marks and citations omitted). Employers may need help understanding the existence and precise scope of employees' religious needs. Employees, in turn, may lack an understanding of work requirements and which particular components of a request for an accommodation could prove especially burdensome on the employer. Prospective employees in particular often have only a limited understanding of the employer's business and thus will not know that their religious practice requires accommodation. The "bilateral cooperation" of which this Court spoke in

Philbrook, 479 U.S. at 69 (citation omitted), is thus essential to ensuring that employment decisions are based on facts, not fears or overbroad generalizations.

II. The Tenth Circuit's Rule Undermines Both Title VII's Central Purpose and Its Central "Bilateral Cooperation" Mechanism

No one disputes that respondent refused to hire Ms. Elauf "because of her headscarf." Pet. App. 9a. Yet the Tenth Circuit concluded that the EEOC failed to make out even a *prima facie* failure-to-accommodate case of religious discrimination. *Id.* at 28a.

The Tenth Circuit's decision is wrong. If allowed to stand, the rules it endorsed will reward willful blindness and undercut the "bilateral cooperation" that this Court has recognized as the central mechanism for advancing Title VII's equal opportunity objective. The multiple, highly restrictive requirements the court purported to derive from the Title VII *prima facie* case are not supported by—and are, in critical respects, contrary to—the statutory text. Nor are they warranted by the policy considerations cited by the court below. The Court should reverse the decision and make clear that an employer—or employee—who reasonably perceives a conflict between a work requirement and religious practice is subject to the bilateral cooperation responsibility.

A. The Tenth Circuit's Approach Would Reward Willful Blindness and Short-Circuit Bilateral Cooperation

Under the Tenth Circuit's approach, a Title VII claim fails at the threshold unless the relevant

decisionmakers actually learn directly from the applicant or employee herself, see Pet. App. 29a, that she engages in certain practices for religious reasons and feels "obliged by [her] religion" to do so. *Id.* at 52a. This is so whether or not the applicant or employee knows or has reason to know of a work requirement that might collide with her religious practice or whether the employer suspects (correctly) that such an accommodation would be necessary.

This approach provides a simple roadmap for any employer who wants to engage in intentional hiring discrimination based on religion: Don't ask, don't tell. Whether motivated by outright animus, a disposition to cater to the prejudices of employees or customers, or a simple desire to avoid the perceived burdens of the statute's reasonable accommodation process, an employer operating under the Tenth Circuit's rule need ensure only that it never obtains "particularized, actual knowledge," Pet. App. 36a-40a, of an applicant's religious observances and practices.[5]

Rewarding such willful or pretended ignorance (or worse) is the antithesis of how Title VII is meant to work. There can be no "reconciliation of the needs of

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[5] Concerns about intentional circumvention of—and outright hostility toward—the reasonable accommodation responsibility are hardly hypothetical. The evidentiary record the Tenth Circuit held insufficient to state a *prima facie* case included testimony by Cooke, respondent's employee who interviewed Elauf, that Johnson, the supervisor who directed her to lower Elauf's score based on the hijab, had answered Cooke's statement that Elauf was "a very good candidate" by saying, "[y]ou still can't hire her because someone [else] can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them." Pet. App. 99a.

the employee's religion and the exigencies of the employer's business" (*Philbrook*, 479 U.S. at 69 (citation omitted)), unless both sides know there is a need for reconciliation in the first place. And there will be no "bilateral cooperation," *ibid.*, if an employer who has enough information to reasonably perceive (as this employer did) that a particular practice is religious in nature may simply decline to hire an applicant because of that very practice without making any inquiry into the nature of the conflict or the feasibility of accommodating it.[6]

The inevitable result of the Tenth Circuit's approach will be refusals to hire otherwise qualified people whose religious needs would actually entail no hardship whatsoever. For one thing, this will be so in situations where the bilateral process the employer preempts would have yielded a mutually satisfactory reconciliation. See EEOC Compliance Manual, Section 12: Religious Discrimination 12-IV(A)(2) (stating that "[e]mployer-employee cooperation and flexibility" are "key to the search for a reasonable accommodation"). But it will also occur in situations where discussion would reveal there is *no* actual work-faith conflict, either because the employer made unwarranted assumptions about the applicant's

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[6] The Tenth Circuit itself has, in cases involving "reasonable accommodation" under the Americans with Disabilities Act, recognized the need to police opportunistic employer behavior. See *Davoll* v. *Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999) ("[Employer] cannot preempt the interactive process with its policy and actions and then escape liability by claiming [the ADA plaintiff] did not properly initiate the process."); cf. *Beck* v. *Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("[N]either party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability.").

religious needs or because the applicant would not have sought accommodation had she known the nature of and reasons for the employer's rules. Cf. 18 Cong. Rec. 706 (1972) (statement of Sen. Randolph) ("I think that usually the persons on both sides of the situation, the employer and the employee, are of an understanding frame of mind and heart * * * I think they are just building upon conviction, and, hopefully, understanding and a desire to achieve an adjustment[.]").

The Tenth Circuit's approach could prove especially problematic in the modern hiring environment. Consider an employer who relies entirely on an online application form to winnow the applicant pool. Under the Tenth Circuit's approach, such an employer would exempt itself from the religious accommodation process altogether by requiring all applicants to check a box stating that they would be available to work "all seven days of the week," without providing Sabbath-observing applicants with any means to make the disclosure on which the Tenth Circuit rule makes their Title VII rights (and the employer's responsibilities) depend.[7]

But it is actually worse than that. The Tenth Circuit's approach gives religiously observant applicants only one reliable means of preserving their Title VII rights: inform *every* prospective employer, at the very outset, of *every* religious observance or practice that might *conceivably* conflict with *any* rule or requirement that the employer might *possibly*

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[7] A Sabbath-observing applicant who checked the box in order to get to the next stage of the hiring process would risk disqualification for dishonesty or being denied an accommodation on waiver grounds.

have. For example, an Orthodox Jewish applicant might disclose that he, among many other things, observes the Sabbath, keeps kosher, wears a yarmulke, will not work on Yom Kippur, and observes the laws of shatnez, which forbid wearing garments that combine linen and wool; a Muslim applicant might mention the hijab, the rules of halal, daily prayers, the Ramadan fast, and so forth. Many of the so-disclosed practices and observances would never give rise to actual conflicts. Yet it is not difficult to imagine that an employer, faced with such a disclosure by one applicant among many similarly qualified ones, might swiftly move that application to the bottom of the pile.

B. The Tenth Circuit's Rule Is Unsupported By and Is, in Central Respects, Contrary To The Statute

The Tenth Circuit's rule has three main features: (1) an applicant herself must "provide the employer with explicit notice" of the need for a religious accommodation, Pet. App. 29a; (2) a plaintiff must show that the employer had "particularized, *actual* knowledge of the key facts that trigger its duty to accommodate," *id.* at 34a; and (3) the religious practice that motived the employer's decision must be "inflexible," *id.* at 23a. None of those requirements has any basis in the statutory text. And none warranted dismissing the EEOC's claim at the *prima face* case stage.

1. First-Party Notice. It is black-letter law that a party who has actual knowledge of a fact may not claim ignorance of that fact for purposes of establishing or defeating liability. See, *e.g.*, Restatement (Second) of Torts § 541 (1977) ("The recipient of a fraudulent misrepresentation is not

justified in relying upon its truth if he knows that it is false or its falsity is obvious to him."); cf. *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280 (2010) (interpreting "public disclosure" bar under False Claims Act, 31 U.S.C. § 3130(e)(4)).

Title VII is no exception. Nothing in the statutory text limits its prohibition to discrimination "because of" an individual's race, color, sex, national origin or religion, 42 U.S.C. § 2000e-2, to information that the employer learned from the very individual in question.[8] An employer who learns from someone other than the applicant that the applicant is African American, female, or Mexican-American and takes action on that basis is no less liable for employment discrimination than one who acts after having being told so by the prospective employee. See, *e.g.*, *Megivern* v. *Glacier Hills, Inc.*, 519 Fed. Appx. 385, 389, 396 (6th Cir. 2013) (plaintiff raised triable claim of pregnancy-based sex discrimination, 42 U.S.C. § 2000e(k), where decision-maker learned of pregnancy from plaintiff's co-worker); *Hitchcock* v.

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[8] The Tenth Circuit's arbitrary, atextual rule limiting actionable awareness to that gained directly from the applicant echoes the rule rejected in *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003), which had held that only "direct evidence" of discrimination could entitle a Title VII plaintiff to "a mixed-motive" jury instruction. *Id.* at 92. *Desert Palace* explained that a Title VII plaintiff, like litigants in other civil cases, must simply "prove his case by a preponderance of the evidence," *id.* at 99 (internal quotation marks, brackets, and citation omitted), and then canvased decisions from a variety of settings recognizing that direct evidence is not intrinsically more probative. The same is true here: knowledge gained through observation or inference can be as reliable as that obtained through first-party communication.

Angel Corps, Inc., 718 F.3d 733, 734-735 (7th Cir. 2013) (similar); cf. *EEOC* v. *BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 478 (10th Cir. 2006) (reinstating Title VII race discrimination claim where "[i]t [was] undisputed that the human resources official who made the decision to terminate Mr. Peters worked in a different city [and] had never met [him]"), cert. dismissed, 549 U.S. 1334 (2007).

There is no warrant for treating Title VII claims alleging religious discrimination differently from these other claims. An employer who dismisses a new hire after being told by a third-party that the employee is a Mormon (or that he wears distinctive garments as part of his religious faith) is no less liable for discrimination than an employer who does the same after hearing that the employee is Greek-American.

It is true that the religious character of certain practices may be nonobvious or genuinely obscure and that "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects." *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 449-450 (7th Cir. 2013) (citation and internal quotation marks omitted). But that also can be true of other characteristics that Title VII forbids employers from relying upon. See *Hitchcock*, 718 F.3d at 734 (case involving employee who was three months pregnant). The reason an employer who genuinely does not know that a particular practice is religious is not subject to Title VII liability is the same as the reason liability may not be imposed if he is unaware a rejected applicant is Mexican-American: The statute requires a showing that the protected trait "was a motivating factor" in

the challenged decision. 42 U.S.C. § 2000e-2(m). But the statute is silent—and utterly indifferent to—the *source* of the employer's information.

2. Particularized, Actual Knowledge. The Tenth Circuit's further insistence that an employer have "particularized, *actual* knowledge of the key facts that triggered its duty to accommodate," Pet. App. 34a, is equally erroneous. Once again, such a rule finds no support in the statutory text, which simply requires a plaintiff to show that an employer discriminated against him "because of" his "religion." 42 U.S.C. § 2000e-2(a)(1).

The Tenth Circuit concluded that no such showing could be made here: Because the decisionmakers simply "*assumed*" and "*figured*" but "did not know," Pet. App. 40a (quoting testimony, emphasis added by Tenth Circuit) that Ms. Elauf wore a hijab for religious, rather than personal, reasons, the opinion reasoned, respondent could not have discriminated against her "because of" her religion. *Id.* 41a.[9]

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[9] The court used the term "particularized" to impose an unusually onerous communication burden. No one would argue that an employer should be liable for failing to accommodate an employee who walked off the job in the middle of a Friday work-shift if the employer knew he was Jewish, but had no idea—and was not even told by the employee at the beginning of the Friday afternoon shift—that he was a Sabbath observer. See Pet. App. 50a-51a (discussing this hypothetical). But under the Tenth Circuit's hyper-charged version, an Orthodox Jew who wears a yarmulke to work each day could be denied accommodation for that practice unless he had expressly negated the hypothesis, *never actually entertained by his longtime employer*, that he did so for nonreligious reasons. See Pet. App. 7a.

On the metaphysical plane to which the decision below

That is simply wrong. An anti-Semitic supervisor who relentlessly harasses a Jewish employee named Goldstein cannot avoid Title VII liability by pointing out that there also are gentiles with that surname and asserting that he simply *assumed* but did not truly *know* that this particular Goldstein was Jewish. The possibility that an employer who makes an adverse decision based on a prohibited characteristic *could have been* (but was not in fact) wrong about whether the employee possessed the characteristic is not ordinarily grounds for relieving the employer of liability.[10] Rather, liability is properly imposed whenever an employer takes adverse action based on those suppositions, without doing anything to dispel purported lingering uncertainty. Accord 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the

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seemed to repair, an employer would not "actual[ly] *know*[]" that an applicant's reasons were religious even if she had told the employer in so many words. Cf. pp. 15-17, *supra*. Indeed, respondent actively challenged Ms. Elauf's religious bona fides after she had stated them in sworn testimony. See Pet. App. 111a-115a (rejecting arguments that Elauf must be insincere because the Quran does not expressly require the hijab and because she did not attend mosque with sufficient frequency).

[10] There is some division in the lower courts over cases where an employer's assumptions turned out to be wrong. Compare *Burrage* v. *FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio March 29, 2012) (rejecting claim by employee subject to intense workplace harassment grounded on the mistaken assumption that he was Mexican-American), with *EEOC* v. *WC & M*, 496 F.3d 393, 401 (5th Cir. 2007) (sustaining claim on behalf of Indian-American Muslim whom harassers mistakenly believed was Arab). But *amici* are aware of no decision before the one below suggesting that an employer may avoid liability simply by asserting that it *could have been* mistaken about an employee's membership in a protected class.

complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor*") (emphasis added). Cf. *Global-Tech Appliances* v. *SEB S.A.*, 131 S. Ct. 2060, 2069 (2011) ("[P]ersons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.") (citation omitted).

3. *Inflexibility*. The Tenth Circuit's decision also included a lengthy and troubling discussion seemingly aimed at limiting the understanding of "religion" in cases where Title VII's accommodation duty is in issue. The court repeatedly suggested that an employer's accommodation responsibility is confined to only those religious observances and practices that an employee or applicant deems "inflexible" or "required," Pet. App. 23a, and perhaps further limited to religious practices grounded on "ultimate ideas about life, purpose and death," *id.* 16a (citation omitted; emphasis removed); see *id.* at 20a ("[E]ven if an applicant or employee claims to be acting for 'religious' reasons, if those reasons actually do not pertain to such ultimate ideas, then that person's conduct would fall outside the protective ambit of Title VII").

Such further limitations do not, as the decision below repeatedly asserted, follow from "Title VII's conception of religion." Pet. App. 41a, 46a, 55a. On the contrary, the court seemed to mine EEOC materials meant to ensure *protection*—for people with sincerely held, but heterodox or unfamiliar, religious beliefs—in order to enable employer claims of "lack of notice" in cases like this one, involving workers with familiar, mainstream religious practices which the employer recognized as such.

But the limitations are foreclosed by the plain text of Title VII in any event. The statute defines "religion" as including "*all aspects* of religious observance and practice, as well as belief," and it describes the employer's duty to accommodate as applying to "an employee's or prospective employee's religious observance or practice." 42 U.S.C. § 2000e(j) (emphasis added). Nothing in this provision suggests that the employer's obligation is limited to *some* aspects of religious observance, those an employee deems inflexible or mandatory. As the Court has stated in cases concerning the "expansive meaning" of the statutory term "any," the word must be understood to mean "all," unless Congress adds "language limiting the [term's] breadth," *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), because the Court "ordinarily resist[s] reading * * * into a statute [words] that do not appear on its face," including "words of limitation." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (internal quotation marks and citation omitted).

Title VII's refusal to distinguish among religious practices and observances makes perfect sense. It respects this Court's repeated "warn[ing]" against having courts try to "determine the place of a particular belief in a religion." *Emp't Div.* v. *Smith*, 494 U.S. 872, 887 (1990); cf. *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) (observing, in RLUIPA case, that "a religious believer who does more than he is strictly required to do is nevertheless exercising his religion. A Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one."). It also reflects the reality that many faith traditions, especially those

outside the three Abrahamic traditions, are not structured around a discrete set of "obligations." Cf. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.11 (1961) (recognizing nontheistic "religions in this country," Buddhism and Taoism).

To be sure, "[a]n employer need not accommodate a purely personal preference," *Vetter* v. *Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997) (internal quotation marks omitted), even one with some broad connection to religion, such as a preference to meet with one's minister during a time that overlaps with a work shift. See Pet. App. 24a (discussing *Turner* v. *Boy Scouts of Am., Inc.*, No. CIV-09-180-C, 2009 WL 2567962, at *2 (W.D. Okla. Aug. 17, 2009)). But any suggestion that less "important" practices or observances that an employee might be willing to forego *in order to keep his job* do not qualify for protection runs headlong into the principle that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989).

C. Policy Considerations, Including Those Invoked Below, Support an Entirely Different Rule

The decision below cited two principal policy considerations for its rule. The first was the danger that an employer might be blindsided with Title VII liability for failing to accommodate a practice it was unaware was religious in character. See Pet. App. 46a-52a. The second was the perceived need to avoid placing employers between a rock and a hard place: Because "the EEOC discourages employers from making inquiries in the first instance regarding the religious beliefs or practices of applicants," *id.* at 24a,

the court of appeals reasoned, the burden must in all cases be placed on the applicant to make clear, on pain of dismissal, that a particular observance is religiously motivated and in need of accommodation. Neither rationale withstands scrutiny.

1. The blindsiding concern fails for two reasons. First, an employee who is actually aware of a conflict between her employer's rules and her religious needs already has strong incentives to point such conflicts out. It is, after all, a familiar adage that "you don't get what you don't ask for." In addition, the rare (if not entirely hypothetical) applicant or employee more focused on a future Title VII lawsuit than on actually having her religious needs met will understand better than others the litigation (and negotiation) value of making a clear accommodation request.[11]

Second, saying that a *suit may proceed* whenever an employer took adverse action based on an observance or practice the employer reasonably concluded was religious is not the same as saying that the employer will be subject to *liability*. Even if a Title VII plaintiff makes out a *prima facie* case, the employer may still prevail if it rebuts the inference of discrimination; if the employee did not uphold her side of the bilateral cooperative responsibility; if the employee refused a reasonable accommodation; or if good-faith exploration of potential accommodations

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[11] The situation might be somewhat different under the Americans with Disabilities Act. Considerations of privacy aside, a person dependent on employer-provided health insurance coverage and diagnosed with a costly-to-treat disease might be reluctant to place that information before her employer, even if doing so would entitle her to some helpful accommodation.

disclosed that none could be offered without causing the business "undue hardship." 42 U.S.C. § 2000e(j).

2. The Tenth Circuit's concern about prompting inappropriate inquiries by employers fails as well. As the court below acknowledged, the reason why the EEOC advises employers against initiating conversations about an applicant's religious beliefs or practices is because those matters "are *generally* viewed as *non job-related* and problematic under federal law." Pet. App. 24a-25a (emphasis added) (quoting EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs*). That rationale has no applicability where, as here, the employer actually observes an applicant engaged in a practice that would, in the employer's view, directly affect the applicant's suitability for the job. To respondent, Ms. Elauf's headscarf was not merely job-*related*—it was an automatic disqualifier, in fact the *only* reason she did not get the job. It is perverse to invoke the interest in protecting religious people from sensitive inquiries, one meant to ensure that qualified people are *hired* on a nondiscriminatory basis, in support of a rule that allows employers to *refuse* employment based on a practice or observance they understand to be religious. In this case, the question need not even have been explicitly religious. Rather, respondent's agents simply could have informed Ms. Elauf that the "Look Policy" would require the removal of any headcovering while at work and asked her if she could comply with that rule.

There are, as *amici* and the EEOC have recognized, serious concerns about intrusive questioning at the hiring stage. See 29 C.F.R. § 1605.3(b)(2) (recognizing influential role of

"representatives of organizations interested in the issue of religious discrimination" in urging rules, adopted by EEOC, limiting pre-employment inquiries). But there are far more nuanced—and far more effective—ways to address those concerns than the Tenth Circuit's sweeping and ultimately counterproductive approach. Most fundamentally, the focus must be on limiting the information that is requested and exchanged to that which is relevant to the job and any potential accommodation. In most cases (as here), any such inquiries can begin and end with the employer's identifying the potentially conflicting job requirement and inquiring about the prospective employee's ability and willingness to abide by it.

Practices under the Americans with Disabilities Act ("ADA") offer the template for a practicable approach. The ADA strictly limits the medical information that may be requested at the application stage. See 42 U.S.C. § 12112(d)(2)(A). At the same time, however, the statute permits employers to extend offers that are conditional on the outcome of job-related medical examinations, *id.* § 12112(d)(3), and it allows broader, though still regulated, testing of employees with disabilities after hire, *id.* § 12112(d)(4). Here, respondent could have extended an offer to Ms. Elauf, made provisional on determining whether her practice of wearing a headscarf was religious and, if so, whether that practice could be accommodated without undue hardship.

Such behavior by employers is not merely consistent with Title VII's purposes: it substantially advances them. As this case well demonstrates,

incomplete information sharing is often the first and primary barrier to reaching "an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Philbrook*, 479 U.S. at 69 (citation omitted). Congress also placed the responsibility of "reasonabl[e] accommodat[ion]" on the employer, subject to a defense of "demonstrate[ed] * * * undue hardship," 42 U.S.C. § 2000e(j). Accordingly, as Judge Ebel explained, "once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices." Pet. App. 86a.

This rule does not, of course, specify when *liability* will be imposed or even when accommodation must be extended. It does, however, give employers proper incentive to participate actively in the process and thereby maximize the prospect that an acceptable, reasonable accommodation will be reached whenever one is available.

* * * *

The facts of this case show the Tenth Circuit's rule to be not just wrong, but self-contradictory. If respondent had actually thought any of the things speculated about in the decision—if it had actually believed that Elauf's scarf might not be worn for religious reasons or that she might not request an accommodation—there would have been no reason to not make a job offer. She would neither require nor be entitled to an accommodation, and either she would remove the scarf or the offer could be withdrawn. Respondent refused employment precisely *because* it

believed the very things the Tenth Circuit says that Elauf failed to tell it—precisely *because* it understood that she would require an accommodation.

III. The Court Should Take Care Not To Endorse Customer Preference as a Proper Component of an Undue Hardship Analysis

This Court granted review to decide a question involving the standards governing a plaintiff's *prima facie* case. Accordingly, this brief has so far treated this case as if it involved a conventional conflict between a valid, neutral rule and a conflicting religious practice. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977) (rejecting claim where accommodation would require employer to violate collectively bargained seniority system); *Kalsi* v. *New York City Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998) (rejecting claim by subway car inspector who would not wear hardhat for religious reasons), aff'd, 189 F.3d 461 (2d Cir. 1999); *Bhatia* v. *Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (sustaining employer's rule, challenged by Sikh employee, requiring all machinists to be clean-shaven, so they could wear respirators with gas-tight face seal).

It is important, however, to underscore the fundamental difference between the interests asserted by respondent here and those by employers in these just-cited cases and others where religious accommodation is similarly difficult. Respondent does not claim that permitting Ms. Elauf to wear a hijab while working would have prevented her from ringing up customers, answering their questions, re-folding inventory, or any of the other tasks typically performed by entry level sales associates. Nor does respondent claim that permitting Ms. Elauf to wear a

hijab would compromise her own safety or that of others (as in *Kalsi*) or adversely affect other employees' bargained-for rights (as in *Hardison*). Instead, the only claim of "hardship" that respondent has offered is that its business would be set back as a result of customers' (hypothesized) negative reactions to Ms. Elauf's "look" when she wore the hijab.

This Court has never endorsed customer preference as a valid ground for an undue hardship defense to a religious discrimination claim under Title VII. But some lower courts have done so. And *amici* urge that, at minimum, the Court resolve this case in a way that takes care to avoid any appearance of endorsing those holdings.

A. Title VII grants employers an "undue hardship" defense in cases where the adverse action is taken because of "religious observance[s] or practice[s]," as against "belief[s]." 42 U.S.C. § 2000e(j). The burden of proving such a defense lies with the employer. Specifically, the employer must "demonstrate[] that he is unable to reasonably accommodate * * * an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of [his] business." *Ibid.*; see *id.* § 2000e(m) (providing that, as used in Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion"); *Gonzales* v. *O Centro Espirita Beneficente UDV*, 546 U.S. 418, 428 (2006) (construing essentially identical "demonstrate" definition in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2(3)).

B. This Court's only decision applying the "undue hardship" defense is *Hardison*.[12] Hardison, a Sabbath observer, worked in a department that needed to "operate 24 hours per day, 365 days per year." 432 U.S. at 66. Shifts were assigned by a seniority system where employees with more seniority picked their shifts first. *Id.* at 67. Following Hardison's voluntary transfer from one worksite to another, he no longer had enough seniority to avoid Saturday work. *Id.* at 68. This Court rejected Hardison's religious accommodation claim and ruled for the employer, TWA. The Court concluded that each of the accommodations suggested by the court of appeals—which included permitting Hardison to work a four-day week or "carv[ing] out a special exception to its seniority system in order to help Hardison to meet his religious obligations," *id.* at 83—"would have worked an undue hardship on the company." *Id.* at 70. The Court also stated that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84.

C. The "hardship" ruling in *Hardison* rested on detailed findings of fact about the impact on other workers' seniority rights and the financial costs of premium wages that TWA would have had to pay in order to release Hardison from Saturday work. See 432 U.S. at 78, 84 n.15. In the intervening decades, however, a number of lower courts have taken an extremely undemanding view of the employer's burden with respect to the undue hardship defense.

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[12] Although hardship was argued in *Philbrook*, the Court did not reach the issue, as it held that the accommodation the defendant in that case had afforded might itself satisfy the statutory "reasonable accommodation" obligation. 479 U.S. at 68-69.

Consider, for example, *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004). In that case, the First Circuit sustained an undue hardship defense based on little more than an appeal to the "axiom[] that, for better or for worse, employees reflect on their employers," the court's own conclusion that the employee's "facial jewelry influenced Costco's public image," and the employer's "calculation" that the jewelry "detracted from [Costco's] professionalism." *Id.* at 135. After reviewing other decisions that had "upheld dress code policies," against Title VII claims, the court asserted that "it is not the law that customer preference is an insufficient justification as a matter of law." *Id.* at 136 (internal quotation marks omitted) (quoting *EEOC* v. *Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981)).

Other courts have been more willing to hold employers to their statutorily assigned burden of proof. In *EEOC* v. *Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006), for example, the employer claimed it could bar all head coverings for rental counter employees because "any deviation from [Alamo's] carefully cultivated image is a definite burden." *Id.* at 1015 (internal quotation marks omitted). The court granted partial summary judgment for the EEOC, noting that the "record provides no material factual basis for Alamo's conclusions about the cost of 'any deviation' from the uniform policy" and recognizing the employer's assertions to be legally insufficient "speculation." *Ibid.* The decision in *EEOC* v. *Red Robin Gourmet Burgers, Inc.*, No. CO4-1291 JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005), likewise recognized that a proper assertion of undue hardship must be "supported by proof of *actual* imposition on coworkers

or disruption of the work routine," *id.* at *4 (quotation marks and citation omitted; emphasis added), and denied summary judgment on claims that employing a server whose religiously significant tattoos were visible would be "inconsistent with" the company's "image," noting the absence of evidence "that any customers complained about [the employee's] tattoos." *Id.* at *4-*5.

Notably, the district court in this case, in a ruling that the court of appeals was not required to reach, applied a similarly fact-based approach to conclude that respondent's "undue hardship" defense failed. Without questioning respondent's assertions of the significant role its dress and appearance codes generally play in its "brand," the trial court noted that respondent had granted a number of religious accommodations to hijab wearers (and others) in other store locations and had not identified any adverse impact on its business from having done so. See Pet. App. 119a-120a.

D. Regardless of the level of proof required, *amici* have significant concern about courts' readiness to treat employee appearance and "look" requirements as fundamentally similar to employer interests in safety or seniority. As the Court is well aware, "customer preference" justifications have a long—but deservedly unsuccessful—history in American employment discrimination law. An employer's interest in catering to the perceived racial and gender preferences of its customers has been categorically rejected under Title VII. See *Chaney* v. *Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981). As the Fifth Circuit explained in a path-

marking decision rejecting an airline's defense of its women-only flight attendant policy:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Diaz v. *Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

There can be little doubt that similar assertions would be rejected in cases involving discrimination based on national origin or disability. Indeed, it is easy to envision a "Look Policy" aimed at attracting clean-cut "East Coast," "preppy" customers, Pet. App. 3a, that would exclude Mexican-Americans, people who use wheelchairs, and religiously observant Hindus, Sikhs, and Jews.

Whatever the theoretical distinction between a clearly impermissible deference to customer aversion to Hindus, Sikhs, or Jews as such and deference to customer aversion to those who follow these religions' teachings concerning hair, beards, garments, and head coverings, it is unlikely, especially in light of the sometimes intense public prejudice harbored toward members of these groups, that such a rule could be sustained without compromising the core antidiscrimination commitments of Title VII. See

Romtin Parvaresh, Note, *Prayer for Relief: Anti-Muslim Discrimination As Racial Discrimination*, 87 S. Cal. L. Rev. 1287, 1299 (2014) (highlighting similarities between race-based prejudice and present-day bigotry directed at Muslims in the United States); cf. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 617-618 (1987) (holding anti-Semitic vandalism actionable under Reconstruction Era statute "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").[13]

Few courts have grappled with these questions head on. That said, notwithstanding Title VII's prohibition on policies that "limit, segregate, or classify * * * employees * * * because of such individual's * * * religion," 42 U.S.C. § 2000e-2(a)(2), some lower courts have held that relegating members of religious minorities to non-customer contact positions on appearance grounds may constitute a "reasonable accommodation." See Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. Rev. L. & Soc. Change

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[13] Respondent's applying a "look" policy to exclude Ms. Elauf, a "fashion conscious young woman" who shops at respondent's stores and wears its clothing, see Pet. App. 96a, 114a, might, alternatively, be described as expressing an invidious stereotype: that faithful religious women who cover their hair cannot achieve the "look," no matter how closely their attire conforms to respondents' "preppy" and "casual" style. Pet. App. 3a; see *Diaz*, 442 F.2d at 389 ("Of course, Pan Am argues that the customers' preferences are not based on 'stereotyped thinking,' but the ability of women stewardesses to better provide the non- mechanical aspects of the job.").

103, 120-123 (2012) (discussing cases).

When these issues are ripe for this Court's decision, *amici* will urge that, as has been the case in interpreting Title VII's bona fide occupational qualification provisions, courts not treat the costs associated with defying customers' discriminatory tastes as a cognizable "hardship" under *Hardison*. Until then, however, we simply urge that the Court take care to decide this case so as to avoid endorsing the contrary view.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

The American Jewish Committee **(AJC)**, a global Jewish advocacy organization with over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC has long been a champion of the principle that the failure of a workplace to provide a reasonable accommodation of a religious practice, absent undue hardship, is nothing less than a form of religious discrimination.

The Anti-Defamation League **(ADL)** Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, religious and other forms of prejudice in the United States, ADL is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. This case addresses two of ADL's core priorities: preserving religious freedom and eradicating discrimination.

ADL believes that discrimination against individuals and infringing on individuals' religious freedom are corrosive elements in society that Congress and the states have sought to combat through the establishment of anti-discrimination laws. ADL advocates for the passage, strengthening, and enforcement of laws that aim to eradicate discrimination and laws that protect religious freedom. ADL has also participated in the major Church-State and discrimination cases of the last half-century.

The League remains vitally interested in ensuring that an employee with a legitimate

workplace discrimination claim is afforded the protections long established under Title VII of the Civil Rights Act of 1964.

The Jewish Council for Public Affairs **(JCPA)** is the coordinating body of 17 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, the JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society. These values motivate JCPA's advocacy. The JCPA is opposed to religious discrimination in all contexts.

The Jewish Social Policy Action Network **(JSPAN)** is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which their participation in the economic and commercial life of their communities was limited.

JSPAN's interest in this case stems directly from the experience of members of the Jewish community, many of whom have faced workplace discrimination stemming from the need to observe traditional religious practices and garb. If the decision of the lower court were to stand, employers could discriminate based upon unfounded perceptions and stereotypes without requiring any form of interactive dialogue. Such a result would undermine the statutory purpose of promoting reasonable accommodations and would deny members of minority faiths equal employment opportunity.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is to protect the rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance. Americans United has more than 120,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in many of this Court's leading church-state cases, including cases addressing the availability of religious accommodations. Americans United has long recognized the importance of reasonable accommodations to relieve substantial burdens on religious exercise, so long as those accommodations do not interfere with the rights or benefits of third parties.

The National Center for Lesbian Rights (NCLR) is a national legal advocacy organization for lesbian, gay, bisexual and transgender people, including those who belong to diverse faith communities. NCLR and the communities we represent have a strong interest in ensuring fair and robust protections against employment discrimination on multiple bases, including religion.

Union for Reform Judaism, Central Conference of American Rabbis (CCAR), ***and Women of Reform Judaism*** The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and the

Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of a commitment to religious freedom. Americans of all faiths must be free to follow the dictates of their conscience when it comes to religious expression.